IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 30

UNITED STATES OF AMERICA,

Petitioner,

v.

ROOSEVELT HUDSON HARRIS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINION BELOW

The opinion of the Court of Appeals reversing the judgment of conviction (A. 24-26) is reported at 412 F.2d 796.

JURISDICTION

The judgment of the Court of Appeals was entered on May 28, 1969. By order of Mr. Justice Stewart, dated June 26, 1969, the time for filing a petition for a writ of certiorari was extended to and including July 26, 1969. The petition for a writ of certiorari was filed on July 25, 1969, and granted on February 24, 1970. By order of December 14, 1970, undersigned counsel was appointed by the Court to represent the respondent. The jurisdiction of the Court rests upon 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Did the Court of Appeals correctly conclude that the affidavit, dependent upon the tip of an unidentified informant, failed to establish probable cause for the issuance of a search warrant?

CONSTITUTIONAL PROVISION

The Fourth Amendment to the Constitution of the United States:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATUTE INVOLVED

Subsection (a) (2) of 26 U.S.C. § 5205 provides in pertinent part:

> No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof is stamped by a stamp evidencing

the determination of the tax or indicating compliance with the provisions of this chapter.

RULE INVOLVED

Rule 41 of the Federal Rules of Criminal Procedure provides in pertinent part:

> (a) Authority to Issue Warrant. A search warrant authorized by this Rule may be issued by . . . a United States Commissioner within the district wherein the property sought is located.
>
> * * *
>
> (c) Issuance and Contents. A warrant shall issue only on affidavit sworn to before the commissioner and establishing the grounds for issuing the warrant.
>
> * * *
>
> (e) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized . . . to suppress for use as evidence anything so obtained on the ground that ***
>
> (4) there was not probable cause for believing the existence of the grounds upon which the warrant was issued. ***

STATEMENT

The respondent was sentenced to prison for two years for possessing six and nine-sixteenths gallons of non-tax paid whiskey. (A. 30) 26 U.S.C. § 5205(a) (2). The whiskey was seized from respondent's shack and nearby outside areas, pursuant to a search warrant issued on the affidavit of a special investigator of the Alcohol and Tobacco Tax Division of the Internal Revenue Service. The heart of the affidavit was a tip received from an unidentified informant described by the investigator as "a prudent person".

Respondent filed a motion to suppress the seized liquor alleging that the affidavit did "not contain sufficient information upon which a search warrant could or should have been issued" in that it failed, among other things, to "state the reputation of the informant." (A. 28)

In essence, the affidavit contained the following recitations (A. 3-4):

(1) The investigator-affiant stated that the respondent "had a reputation with me for over 4 years" as a trafficker in non-tax paid whiskey.

(2) Over the 4 year period, the affiant had "received numerous information from all types of persons" as to respondent's "activities".

(3) "[D]uring this period of time" a named constable had located a cache of illegal whiskey "in an abandoned house under Harris control. . ."

(4) Finally, on the day the affidavit was made, the affiant interviewed an unnamed informant whom he "found . . . to be a prudent person" and obtained from him "a sworn verbal statement" that:

(a) The informant had purchased illicit whiskey from the respondent's residence for more than two years, most recently within the past two weeks.

(b) The informant had "knowledge" of a person who had purchased illicit whiskey there within the past two days.

(c) The informant had "personal knowledge" that the illicit whiskey was consumed by purchasers in a building on the premises known as the "dance hall" and had seen the respondent on numerous occasions go to yet another building on the premises about 50 yards from the residence "to obtain the whiskey" for the informant and others.

The informant did not testify at the hearing on the motion to suppress, nor, so far as appears, at the trial.[1] The motion to suppress was overruled (A. 29) and renewed unsuccessfully at trial. (R. Doc. #10)

SUMMARY OF ARGUMENT

The requirements for a search warrant affidavit reflected in this Court's major decisions, *Nathanson v. United States*, 290 U.S. 41, *Aguilar v. Texas*, 378 U.S. 108, *United States v. Ventresca*, 380 U.S. 102, and *Spinelli v. United States*, 393 U.S. 410 fully respond to the reality that "probable cause is a practical, non-technical conception". *Brinegar v. United States*, 338 U.S. 160, 176. Accordingly, the unanimous decision below faithfully adheres to the commonsense teachings underlying a proper analysis of probable cause. The Court of Appeals properly found this affidavit insufficient because it rested upon a tip from an unidentified informant without providing a basis upon which a magistrate could assess the informant's credibility.

This affidavit attests to the informant's credibility by describing him as "a prudent person" without affording any facts or reasons that would enable a magistrate to evaluate the officer's appraisal. The Court of Appeals thus properly examined the tip itself and then looked at "other allegations which corroborate the information contained in the hearsay report". *Spinelli, supra*, 393 U.S. at 415. But this affidavit lacks such corroboration and there was no investigation subsequent to the tip to substantiate any of the information it purported to convey.

Although there is no rigid rule requiring independent investigation and no technical formula for a sufficient affidavit, the Fourth Amendment does require *independent*

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[1] The transcript of the hearing on the motion to suppress at which the affiant alone testified is reprinted in the Appendix (A. 6-23). The trial proceedings were not transcribed.

assessment of "probable cause" by the issuing magistrate. When an informer's tip is the heart of the application for a warrant, a magistrate can conclude that "probable cause" exists only if he is presented with a basis for concluding that the tip conveys "reasonably trustworthy information". *Brinegar, supra,* 338 U.S. at 175-76. Commonsense teaches that if a tip is uncorroborated, trustworthiness will largely depend upon the credibility of the person who gives it. A magistrate abdicates his constitutional function if he merely accepts, without a basis for independent judgment, the assertion of an officer that the informant is "prudent" or "credible". When the tip is pivotal, such blind faith is tantamount to accepting blindly the officer's "mere affirmance of belief" in probable cause. *Nathanson, supra,* 290 U.S. at 47.

Most importantly, the decision below does not impair the ability of the police to establish the credibility of an informant who has not previously supplied information. In cases such as this, with no emergency characteristics and no likelihood that evidence or the accused will disappear, police commonly and effectively support a naked tip by asking an untested informant to make the "buy" under monitored conditions. If the informant wishes to remain anonymous, that "buy" will justify a subsequent search pursuant to warrant so that the evidence can be produced at trial through a police witness. Such a procedure protects the police, improves cases, develops the informant's credibility for possible future use, and is otherwise convenient and effective. The availability of that "reasonable" procedure cannot be ignored in a Fourth Amendment analysis.

Finally, the Court should consider whether the writ was providently granted in this case. If the grant was prompted by the problem of the first-time informant, criminally uninvolved, who may therefore be more reliable than a "regular", this case presents an inadequate record. Not only is there no evidence that this informant was "first-time", but there is proof that he regularly violated the same

statute underlying respondent's conviction. Accordingly, this record does not expose, much less explore, the legitimate needs of law enforcement that may arise, particularly in emergencies, when information is received from an untested, but presumptively credible source. Especially in the Fourth Amendment area where "reasonable" behavior under particular circumstances is the benchmark, constitutional judgments should be informed by a full and unambiguous record.

ARGUMENT

The Government's attack upon the unanimous judgment below rests upon two propositions: (1) that it is a typical result of applying "the guidelines suggested in *Aguilar* and *Spinelli* in a rigid, technical manner that loses sight of the commonsense nature of the relevant inquiry", (Gov't Br. p. 10); and (2) that affirmance will make it "very difficult to establish the credibility of an informant who has not previously supplied information to the police or who desires to remain anonymous". (Gov't. Br. p. 15) Ironically, both propositions lose sight of the commonsense foundation for this Court's affidavit rulings as applied in the decision below, as well as the commonsense alternatives that police commonly and effectively use with untested informants in cases such as this.[2]

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[2]Since the judgment below was unanimous, three of the four judges who have passed upon this affidavit have found it lacking. *Cf. Spinelli v. United States*, 393 U.S. at 430 (Black, J. dissenting) (Seven of nine judges upholding the affidavit). "Although the reviewing court will pay substantial deference to judicial determinations of probable cause," *Aguilar v. Texas*, 378 U.S. at 111, this case is much weaker than *Spinelli* for application of that principle.

I. THIS AFFIDAVIT GAVE NO BASIS IN LAW OR COMMONSENSE FOR A FINDING BY THE COMMISSIONER OF PROBABLE CAUSE TO ISSUE A SEARCH WARRANT.

Applying the teachings of this Court's decisions, the Court of Appeals found no adequate justification in the supporting affidavit for the Commissioner's "probable cause" determination. Since a tip from an anonymous informant occasioned the search and lay at the heart of the affidavit, the court focused primarily upon it. Examining the tip alone and in the full context of the affidavit, the court found no basis upon which the Commissioner could have reached an *independent* judgment that the informant's report was trustworthy. And since, without a trustworthy tip, the affidavit plainly failed to establish "probable cause" to search, the search was held unlawful. This decision does no more than reaffirm the good sense underlying the requirement that when a search depends upon an informer's tip, a magistrate must be presented with some basis for confirming on his own the trustworthiness of the hearsay information.

The need for independent confirmation derives from first principles of Fourth Amendment jurisprudence:

> The point of the Fourth Amendment . . . is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. *Johnson v. United States,* 333 U.S. 13, 14; See also *United States v. Lefkowitz,* 285 U.S. 452, 464.

To ensure that the ultimate judgment of "probable cause" does not rest with the enforcing officer, an officer's affidavit must present to the intervening magistrate the materials for a realistically independent judgment. Accordingly, in *Nathanson v. United States,* 290 U.S. 41, 47, this Court held that even when an officer's affidavit does not rest upon

an informant source, a magistrate "may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor *from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough*". (emphasis added)

Since a law enforcement officer is identified, under oath in the affidavit, presumptively trustworthy, and most often involved in a continuing institutional relationship with the issuing magistrate, his affidavit need not attest to his own credibility.[3] That affidavit, reporting the officer's own observations, satisfies the demands of the Fourth Amendment if it sets forth sufficient facts from which a magistrate may confirm the judgment that those facts, taken as true, establish probable cause to search.

When a tip from an unidentified informant is the crux of the officer's affidavit, however, a second judgment must be rendered by the issuing magistrate—a judgment as to the trustworthiness of the information coming from that unknown source. For however trustworthy the affiant officer, commonsense tells us that his presentation of "probable cause" is only as strong, in the informer setting, as the *credibility* of the informer and the *reliability* of the evidence upon which the informer based his judgment. *Aguilar v. Texas, supra,* did no more than give expression to those two criteria for judgment.[4] More important still, these cri-

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[3]In addition, there will be other circumstances when the credibility of a source is presumed. See e.g., *United States v. Ventresca,* 380 U.S. 102, 110-11 (other police officers).

[4]The twin standards of "credibility" and "reliability" are embodied in the proposed amendments to Rule 41(c) and Rule 4(a) of the Federal Rules of Criminal Procedure for the United States District Courts (Prelim. Draft 1970)

Rule 41(c) would be amended in part to provide that:

> The finding of probable cause shall be based upon substantial evidence, which may be hearsay in whole or in part, *provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a*

teria are rooted in the most fundamental articulations of the Fourth Amendment's requirement for probable cause:

> "The substance of all the definitions" of probable cause "is a reasonable ground for belief of guilt." . . . Since Marshall's time, at any rate, it has come to mean more than bare suspicion. Probable cause exists where "the facts and circumstances within their [the officers'] knowledge, *and of which they had reasonably trustworthy information* [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.[5] (emphasis supplied) *Brinegar v. United States*, 338 U.S. 160, 175-76.

Put in summary terms, if there is a basis upon which a magistrate can independently assess the informer credible, there is cause to believe that his report truthfully recounts an actual experience. And then if there is a basis for independently confirming the quality of the evidence contained in his report, there is cause to believe it reliable or probative as well. Together these elements of credibility and reliability establish the tip as "reasonably trustworthy information", 338 U.S. at 175, within the meaning of the "probable cause" requirement. Translated into the terms of commonsense, in evaluating the substance of a report from an unknown source, "a man of reasonable caution", *Brinegar, supra*, 338 U.S. at 175-76, would want sufficient facts to

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factual basis for the information presented. (emphasis supplied)

See also the Advisory Committee Notes to these sections.

[5] Although *Brinegar* involved a search without a warrant, its standard has been applied in warrant cases. See e.g. *United States v. Ventresca*, 380 U.S. 107, 108; *Jones v. United States*, 362 U.S. 257, 270. See also *Spinelli v. United States, supra*, at 417, note 5.

Strictly speaking, in warrant cases the standard should be articulated as probable cause to believe that items connected with criminal activity will be found in the place to be searched. Hall, Kamisar, LaFave and Israel, Modern Criminal Procedure, 257 (3rd Ed. 1969). See *Rugendorf v. United States*, 376 U.S. 528, 533.

support a belief both that the report has not been falsified or distorted and that its accusations rest on something more than "a casual rumor", "an offhand remark heard at a neighborhood bar", or "an individual's general reputation". *Spinelli, supra,* at 416-17.

There are no rigid rules or tests to be met in arriving at such commonsense judgments. This Court's opinions discuss some of the ways in which affidavits can meet these constitutional requirements. And the decision below reflects only the judgment that under no plausible approach is a case for probable cause made in this affidavit.

The affidavit here is utterly deficient because (1) apart from the informant's tip, it fails to establish "probable cause" that illegal whiskey would be found on the premises; (2) the tip fails to establish probable cause since the affidavit affords no basis for believing the informant credible; and (3) the affidavit viewed as a whole adds no substance to the sum of its parts.

A. The Affidavit Apart From the Tip

The Government does not contend that this affidavit can stand apart from the tip. Indeed, no such contention would even have been plausible, for apart from the informant's report, the affidavit is all but rank gossip. The affiant asserts that Harris "had a reputation with me for over 4 years" as a trafficker in illegal whiskey. This allegation does not even rise to the level of personal knowledge arguably present in the *Spinelli* allegation that the defendant therein was "known" to the FBI as a gambler. Even such an allegation was "not itself a sufficient basis for a magistrate's finding of probable cause". 393 U.S. at 418. And the weaker suspicion alleged here is enfeebled even further by the affidavit's designation of the "sources" of the reputation—"over this period I have received numerous information from all types of persons as to his activities".

The only other non-tip allegation pertains to premises different from the target of this search—"an abandoned house under Harris' control" where a stash of illegal whiskey was allegedly found by a local constable. More importantly, the affidavit describes that discovery as having occurred only sometime "during" the 4 year period. Presumably in recognition of these infirmities of place and time, the Government admitted on the motion to suppress that the allegation "could be stricken from the affidavit without effecting [sic] its validity".[6] See *Rosencranz v. United States*, 356 F.2d 310, n. 3 (1st Cir. 1966); *Schoeneman v. United States*, 317 F.2d 173, 177 (D. C. Cir. 1963); see also *Sgro v. United States*, 287 U.S. 206, 210.

Perhaps most notably, the affidavit contains no information derived from police investigation reasonably prior to the tip. Neither does it present corroborative information acquired after the tip was received. We do not suggest that independent police work is required in every case, but its total absence here serves to highlight the all-but-total dependence of this affidavit upon the trustworthiness of the tip allegations.

B. The Tip

As the Court of Appeals concluded, the affidavit's failure to support the credibility of the informant, see pp. 14-18 *infra*, is the fatal flaw in its presentation of the tip. We turn first, however, to a consideration of the quality of the evidence the informant relied upon.

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[6] This admission was made in the Government's Memorandum Brief opposing the motion. That Brief is a part of the Record in this Court, though not reprinted in the Appendix. (R. Doc. #8, p. 5) See Rule 36 (2) of this Court's Rules.

(1) *Qualitative Reliability*

The informant's report relies in part upon his personal observations. The Government's Brief overstates, however, the extent of the first-hand nature of the information conveyed.

The affidavit does recite the informant's own alleged purchase of whiskey from the Harris premises during the two years preceding the search "and most recently within the past 2 weeks". Fairly and properly, the Court of Appeals acknowledged that such a declaration of purchases "directly from the suspect at his residence is tantamount to an assertion of visual observation by the informant". (A. 25) But the tip's information closest in time to the search, purports to present evidence of "a person who purchased illicit whiskey within the past *two days* from the house. . . ." (emphasis supplied) Contrary to the Government's suggestion, this allegation does not rest upon "personal knowledge" tantamount to a visual observation. (Gov't. Br. p. 11) Instead, by contrast with two conspicuous references to the informant's "*personal* knowledge" of facts, the affidavit describes this feature of the informant's story as resting only upon his "knowledge" of the third party's purchase. It thus suggests that the informant's "knowledge" of the most recent purchase was the product, not of his eyewitness experience, but of hearsay from yet another unidentified informant of unknown credibility. Accordingly, there is a serious infirmity in the only item in the affidavit whose timing could indicate that whiskey would still be found on the Harris premises.

Finally, the affidavit relates the informant's "personal knowledge" that whiskey was consumed in an outbuilding on the Harris premises known as the "dance hall" and alleges that he saw Harris go to another outbuilding about 50 yards from his residence "on numerous occasions" to obtain whiskey. Yet for all that appears from this recitation, these events could well have occurred early in the two year purchase relationship alleged. Indeed, that view is

strengthened by the affiant's use elsewhere in the affidavit of "two weeks" and "two days" to describe events that took place in reasonable proximity to the search. See *Rosencranz v. United States*, 356 F.2d 310 (1st Cir. 1966).

(2) *The Informant's Credibility*

However sufficient the qualitative reliability of the informant's evidence, the affidavit cannot survive the fundamental flaw in its presentation of the tip—an utter failure to provide a basis for a magistrate's independent judgment that the informer was a credible person. Once again, commonsense tells us that even a report containing items of the most probative and reliable quality is no better than the basis for believing the items true in the first place. An informer's incriminating conclusion may be based entirely on multiple allegations of personal observation, but "a man of reasonable caution" would not find that conclusion probable unless there were a basis for believing that those observations in fact took place.

In this case, the magistrate was presented with no more basis for assessing the credibility of the anonymous informer than the affiant's conclusion that he found him "a prudent person".

At worst, this characterization is wholly irrelevant to the issue of the informant's credibility. For as the Court of Appeals observed, describing a person as "prudent" says that he is "circumspect in the conduct of his affairs" (A. 25), but says nothing as to his truth-telling habit of mind. The term may be as apt for a successful confidence man as for the most honest citizen.

The defective core of the allegation, however, is not the failure to use the magic words. The message of *Ventresca, supra*, may be sufficient to counsel a "realistic" interpretation of "prudent" so as to save its credibility connotation.[7]

[7] "If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants . . . must

380 U.S. at 108. But *Ventresca* likewise counsels that a "purely conclusory" allegation such as this cannot be saved by any canons of interpretation:

> Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police. *Ventresca, supra,* 380 U.S. at 109.

By contrast, the characterization of this informant as "prudent", without any statement of the basis for the affiant's appraisal, leaves the magistrate with only a rubber stamp in hand. In *Ventresca's* language, "no *reason* for crediting the source of information is given". (emphasis supplied) 380 U.S. at 109.

On the vital issue of credibility, therefore, this affidavit all but reproduces the bald assertions of "reliable information" from a "credible person" in *Aguilar*, 378 U.S. at 109, or from a "reliable informant" in *Spinelli*, 393 U.S. at 422. In fact, where the tip is as pivotal as this one and the credibility of the informant as crucial, for a magistrate to accept the affiant's naked faith in the informant is tantamount to acceptance of his "[m]ere affirmance of belief" in probable cause. And that, this Court from *Nathanson* on has consistently found "not enough".[8] 290 U.S. at 47. *See also, Terry v. Ohio*, 392 U.S. 1, 22.

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be tested and interpreted by magistrates and courts in a commonsense and realistic fashion." 380 U.S. at 108.

[8]The Government appropriately consigns to a footnote (Gov't. Br., p. 13, note 2), the suggestion that the "sworn verbal statement" of the informant adds more. Although the Government characterizes it as "under oath", no record testimony supports that description. *And Cf., Wheatman v. People*, 304 N.Y.S. 2d 904 (1969) (sworn anonymous grand jury testimony insufficient). Indeed there is doubt that the affiant was empowered to administer an oath in this setting. See 26 U.S.C. § 7602, 7622 and Treas. Regs. § 301.7602-1; 301.7603-1; 301.7622-1. Even if he was, however, the guarantee of anonymity to the informer and the absence of a record of his words reduces the prosecutorial threat to him to a nullity. And to the extent an informer is aware of the law protecting his anonymity, *McCray v. Illinois*, 386 U.S. 300 and disabling third parties from attacking the

No more is added to the trustworthiness of the tip by the Government's reliance upon the so-called "explicit detail" it contains. (Gov't. Br. p. 12). This Court acknowledged the potentially supportive role of such detail in *Spinelli*, by reference to the facts of *Draper v. United States*, 358 U.S. 307. In *Draper*, the informant related "with minute particularity", *Spinelli, supra*, 393 U.S. at 417, details as to the place and time of a trip a narcotics dealer would soon take, and then more detail as to his dress and appearance upon returning.

Several points demonstrate the irrelevance of *Draper*-type detail to the circumstances of this case. At the outset, it should be noted that the *Spinelli* Court did not refer to the *giving* of *Draper*-type detail as buttressing the *credibility* of the informant.[9] The ability to give such detail was used instead to suggest that the particularity of some tips may be such as to resolve doubt in ambiguous affidavits as to how the informant "came by the information" he related. 393 U.S. at 416. Since, unlike much in this affidavit, the *Draper* information did not specify whether the informer obtained it by rumor or personal experience, the details given in the tip could lead a magistrate reasonably to "infer that the informant had gained his information in a reliable way". 393 U.S. at 417. For, as Mr. Justice White explicated in *Spinelli*, "the kind of information related by the informant [in *Draper*] is not generally sent ahead of a person's arrival in a city except to those who are intimately connected with making careful arrangements for meeting him".

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truth of his allegations, See, *Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence*, 84 Harv. L. Rev. 825 (1971), the inhibitions on informer falsification or distortion are reduced even further.

If statements under oath should ever be permitted to substantiate the credibility of an informant, the least the law should require is an informant's affidavit sealed by the court to protect his anonymity.

[9]In *Draper*, the informant was named and had proved reliable on other occasions. 358 U.S. at 309.

393 U.S. at 426. (concurring opinion) Notably, the "details" the Government points to in this tip yield no such added support for an inference that the informant learned of those details by personal involvement in the alleged criminal behavior. The informant "recited the approximate distance between the respondent's residence and the outbuilding where he kept his stock of illegal whiskey". (Gov't. Br. p. 12). Unlike the sufficient details in *Draper*, and like those held insufficient in *Spinelli*, the "details" related here describe only publically observable characteristics of an existing residential arrangement, and not predictive particulars about a verifiable future event. Indeed, "[T]his meager report could easily have been obtained from an offhand remark heard at a neighborhood bar". *Spinelli, supra*, 393 U.S. at 417.

More importantly, to the extent the *Draper* details bore upon the truth-telling nature of the informant at all, they did so not because the details, as here, were merely given in the tip, but because they were confirmed by the kind of subsequent police verification wholly absent from this case.[10] Indeed, the opportunity for solid corroborative work was plainly available and convenient here. See 19 *infra*. To be sure, it may be doubtful that corroboration of the scant details provided in this tip would have sufficed to yield probable cause under *Draper*. But if *Draper* can be read broadly enough to attribute significance to corroboration of even these wholly innocent static particulars about the names and locations of buildings on a man's premises, that conclusion only further points up the importance

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[10]It is worth noting that, not prior to the search but during it, the investigator did look into both the "dance hall" and the "outbuilding" for the stock of whiskey the tip implied would be found there. It was not found. (A. 17) Indeed, the only whiskey found on any premises unambiguously belonging to Harris was little more than half a gallon found in his house. That may explain why he was convicted of "possession" rather than "sale" as the tip had implicitly forecasted.

of an adequate presentation of "credibility" information in an affidavit. For then the requirement that the informer be demonstrably credible stands as the only potent legal safeguard against false or distorted accusations by irresponsible anonymous acquaintances of the accused.[11]

C. The Affidavit as a Whole

The Government's last retreat in the effort to save this affidavit is to view the totality of its contents. *Spinelli* properly counsels that "if the tip is found inadequate" on its own "the other allegations which corroborate the information contained in the hearsay report should then be considered". 393 U.S. at 415. But the other allegations here do not even approximate the probative value of the recent corroborative information held insufficient in *Spinelli*. This affidavit adds to the informer's tip Harris' four year old "reputation" and unspecified "numerous information from all types of persons as to his activities". That alone is "but a bald and unilluminating assertion of suspicion" of the sort *Spinelli* held "entitled to no weight in appraising the magistrate's decision", 393 U.S. at 414 and useless to give "additional weight to allegations that would otherwise be insufficient". 393 U.S. at 419. Since the only item other than such gossip pertains to whiskey found elsewhere and unrelated in time to this search, the rest of the affidavit adds little to the trustworthiness of the tip on which its sufficiency depends.

Indeed, this Court should give body to its "commonsense" approach to affidavits such as this by stepping back from a dissection of its parts to view the document as a whole. At the time of the application for this warrant, law enforcement officers knew no more than that Harris had a reputation for trafficking, substantiated to some degree by

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[11] See note 8, *supra*, for legal barriers making it unlikely that the source or content of such accusations will ever come to light.

one incident not at his residence, and perhaps four years stale. Ought this Court to say that the Fourth Amendment renders people with such meager histories forever insecure in their "houses" so long as an anonymous accuser is regarded as "prudent" by the officer receiving his tip?

Nothing in the history or purpose of Fourth Amendment protection suggests that personal security is so tenuously held. Nothing in this Court's cases advises otherwise. And there is nothing as well to the "commonsense" argument advanced here that law enforcement will be hamstrung if this case stands. In a setting such as this, law enforcement authorities have developed ready and convenient techniques for processing tips from untested informers. Where, as here, there is no suggestion that the accused is leaving town after four years, no hint that his alleged business is terminating, and no other facts suggesting emergency, the police simply ask an informant to substantiate his claim that a purchase can be made by making one or arranging that it be made by someone else. Circumstances are then easily brought about in which the police can monitor the purchase to ensure that the buyer visits the place of purchase without any of the contraband to be obtained, and sometimes with a supply of marked money. *See e.g., People v. Dillon,* 44 Ill. 2d 482 (1970); *See also,* Harney & Cross, The Informer in Law Enforcement, pp. 26, 79 (2nd Ed. 1968). After a bottle of whiskey or a packet of narcotics has been so purchased, the informer's tip is of proven reliability, a subsequent search for another bottle or packet is constitutional, and indeed, an informer, "reliable" for future use, has been developed.[12]

The Fourth Amendment's "probable cause" requirement, implementing its protection against "unreasonable" search,

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[12]In still other circumstances, the reliability of informers new to a particular locality can be substantiated by contact with former officers with whom they have worked. See *e.g., Smith v. United States,* 358 F.2d 833 (D. C. Cir. 1966) (Burger, J.)

should be regarded practically, with a view toward accommodating the conflicting needs presented by the almost infinite range of circumstances in which the Amendment is applicable.

> These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, non-technical conception affording the best compromise that has been found for accommodating these often opposing interests. *Brinegar, supra,* at 176.

In settings such as this, however, there is no substance to the claim that the interests of personal security and good police work are "opposing". The judgment below stands to require of law enforcement no more than is already common and effective practice, and no more than is required by a commonsense view of the Fourth Amendment.

II. IF THE COURT WISHES TO CONSIDER THE PROBLEM OF THE FIRST-TIME INFORMANT THIS WRIT SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED.

The Government represents that a particular concern "occasioned our request for certiorari in this case". (Gov't. Br. p. 13):

> In the past, this Court has recognized that an informant's reliability may be established by showing that he has previously given information that proved reliable. . . . We believe, however, that there are circumstances in which a magistrate should be allowed to issue a warrant on the basis of information supplied by a person who has never before

> provided information to the police. In fact, the person who supplies information to the police on only one occasion will often be a more reliable type of individual than one who supplies such information on a regular basis. The latter is likely to be someone who is himself involved in criminal activity or is, at least, someone who enjoys the confidence of criminals.

The concern expressed in these terms is entirely appropriate, for there may well be "circumstances" in which a magistrate should be allowed leeway with first-time informants. A flexible approach to the Fourth Amendment must anticipate that such a setting will arise.

This case, however, is a wholly inappropriate vehicle for the resolution of these concerns. As a starting point, the Court should have before it a record in which it is unambiguous that the informant was in fact giving information for the first time. Such a record, properly made, would afford a firm basis for exposing and resolving such conflicts as are present between individual interests and law enforcement needs. There is not one whit of evidence in this record, however, to substantiate that the informant was in fact "first-time". More importantly, the record is devoid of testimony dealing with the circumstances under which the tip was obtained, the need to search at that time, or any of the other factors that are potentially critical to an assessment of the procedure actually used.[13] Accordingly, nothing in the record even begins to explore the concrete and practical considerations upon which sound Fourth Amendment rules should be fashioned. *See e.g. Wainwright v. City of New Orleans,* dismissed, 392 U.S. 598, 599 (record "too opaque", Harlan, J.; "too sketchy", Fortas, J. and Marshall, J.)

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[13]"Unfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." *Camara v. Municipal Court,* 387 U.S. 523, 536-37.

By contrast, the record does make clear that this informant was *not* the uninvolved citizen, but indeed one who violated on a regular basis the very statute underlying respondent's conviction. That statute makes it unlawful to "buy" illegal whiskey as well as to "sell" or "possess" it. 26 U.S.C. § 5205(a)(2). And the informant's report is a confession that he was often guilty of the very crime charged against the respondent—possession. The Government properly observes that one "who is himself involved in criminal activity" is likely to be less "reliable" than an informant who is not. *See also, People v. Lewis,* 49 Cal. Rptr. 579 (1966). If the Court should reach the merits of this case, that consideration is directly relevant to a commonsense view of whether "reliability" was sufficiently substantiated in this affidavit to establish probable cause. But the presense of a criminal informant is another reason for the Court to wait to address the Government's proper concern in a case that realistically presents it. Cases in which first-time information comes from victims or witnesses to violent crimes are common. *See e.g., Brown v. United States,* 365 F.2d 976 (D. C. Cir. 1966) (Burger, J.); *People v. Griffin,* 58 Cal. Rptr. 701, 711 and cases at note 6 (1967). Common also are cases of emergency involving first-time informants not from the criminal milieu. *See e.g., In re Boykin,* 39 Ill. 2d 617 (1968). This record, by contrast, illuminates none of the considerations those cases would properly tender under a balanced view of the Fourth Amendment.

CONCLUSION

For the foregoing reasons, the unanimous judgment of the Court of Appeals should be affirmed or the writ of certiorari dismissed.

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